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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

ARTHUR TATE, JR., WARDEN,
Petitioner,
vs.
JOHN GLENN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I.

WHETHER THE RECENTLY ENACTED AMENDMENTS TO 28 U.S.C. SECTION 2254 IN THE 1996 ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT REQUIRE THE REVERSAL OR REMAND OF A DECISION VACATING A DEATH PENALTY SENTENCE ENTERED PRIOR TO THE EFFECTIVE DATE OF THE ACT BUT STILL PENDING ON APPEAL IN THE FEDERAL COURT SYSTEM.

II.

WHETHER THE "PREJUDICE" PRONG OF *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984), FOR DETERMINING EFFECTIVENESS OF COUNSEL, IS MET BY THE POST-TRIAL TESTIMONY OF NEWLY HIRED EXPERT WITNESSES WHO CLAIMED THAT COUNSEL COULD HAVE PRESENTED AN ORGANIC BRAIN DAMAGE MITIGATION DEFENSE AT TRIAL, THUS REQUIRING THE VACATION OF A SENTENCE OF DEATH.

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OPINIONS AND JUDGMENTS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit denying the Petition for Rehearing was entered on February 26, 1996 and is unreported. *John Glenn v. Arthur Tate, Jr., Warden*, Case No. 93-3568. (A142).[1] The decision of the Court of Appeals for the Sixth Circuit, entered on December 21, 1995, is reported. *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1996). (A1). The amended order and judgment of the United States District Court for the Northern District of Ohio, entered on April 28, 1993, is unreported. The District Court's initial order, entered on April 8, 1993, also is unreported. *John Glenn v. Arthur Tate, Jr.*, Case No. 5:91CV2047. (A23 and A41). The judgment of the Supreme Court of Ohio denying respondent's postconviction relief motion, which was entered on February 20, 1991, is unreported. *State of Ohio v. John Glenn*, Case No. 90-2231. (A144). The judgment of the Ohio Court of Appeals upon reconsideration of its postconviction action, which was entered on December 11, 1990, is unreported. *State of Ohio v. John Glenn*, Case No. 89-P-2090. (A145). The initial opinion of the Court of Appeals of Ohio denying respondent's postconviction relief motion, which was entered on September 24, 1990, also is unreported. *State of Ohio v. John Glenn*, Case No. 89-P-2090. (A151). The opinion of the Ohio Court of Common Pleas, on postconviction, entered June 21, 1989, is unreported. *State of Ohio v. John Glenn*, Case No. 82-CR-0072. (A188).

JURISDICTIONAL STATEMENT

On February 26, 1996, the United States Court of Appeals for the Sixth Circuit denied the State's petition for

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[1] Page references are to the Appendix, which was filed in a separate volume due to its size.

rehearing. Jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions at issue are the Assistance of Counsel Clause of the Sixth Amendment ("In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.") and the Fourteenth Amendment ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

STATEMENT OF THE CASE

Fourteen years after respondent John Glenn was convicted of killing a deputy sheriff and sentenced to death for doing so, a divided panel of the United States Court of Appeals for the Sixth Circuit reversed his capital sentence. The majority claimed that Mr. Glenn's trial counsel should have presented mitigating evidence that Glenn suffered from organic brain disorder. The dissent disagreed. Like the myriad state courts that had considered the issue and the district court below, Judge Siler found that this strategic decision did not constitute ineffective assistance and in all events would have had little likelihood of altering Glenn's sentence.

This dispute stems from Mr. Glenn's now-unchallenged decision to murder a deputy sheriff in broad daylight on October 22, 1981 in Youngstown, Ohio. For that act, a duly-empaneled jury found Glenn guilty of one count of aggravated murder with a specification that the

victim was a peace officer and one count of escape. He was sentenced to death for aggravated murder and to a consecutive term of two to five years for escape. The Ohio courts reviewed and affirmed his conviction on direct appeal.

Glenn sought postconviction review of his case in the Ohio courts, alleging among other things that his trial counsel were ineffective because they failed to present evidence of organic brain damage at the mitigation hearing following his criminal trial. On June 21, 1989, after an extensive hearing, the Court of Common Pleas of Portage County denied the petition, finding:

> It is therefore the conclusion of this judge that at the mitigation hearing and trial John Glenn was adequately represented by Counsel, that he received good representation and a fair trial ***.

(A189). Glenn then raised the issue of denial of effective counsel, among others, on appeal. On September 24, 1990, the court of appeals affirmed, finding that no substantial prejudice resulted from counsels' performance at the mitigation hearing:

> [W]e cannot find that the trial court abused its discretion in overruling the post-conviction relief proceeding, as it does not appear that but for counsel's failure, the results would have been different, with the jury concluding that the aggravating facts outweighed the mitigating circumstances.

(A186). The Ohio Supreme Court affirmed without opinion on February 20, 1991. (A144).

On October 10, 1991, Glenn petitioned for a writ of habeas corpus under 28 U.S.C §2254 in the United States District Court for the Northern District of Ohio, Eastern Division. In his petition, he raised 27 grounds for relief, including denial of effective counsel at the mitigation phase. On April 8, 1993, the district court denied the petition, again finding no prejudice arising from the ineffective assistance claim:

> In sum, the court concludes that if the petitioner's trial counsel had produced the additional evidence as presented during the post conviction evidentiary hearing there is not a reasonable probability that a different sentence recommendation would have been forthcoming from the jury.

(A103). On April 28, 1993, the district court granted in part Glenn's motion to alter and amend judgment regarding factual corrections, then again denied the habeas corpus petition. (A23).

On December 21, 1995, the United States Court of Appeals for the Sixth Circuit affirmed Glenn's conviction, but by a 2-1 vote reversed his capital sentence. The majority found that Glenn's trial counsel had been prejudicially ineffective during the penalty phase of the state criminal trial. (A-1, A5-A17). More specifically, it determined that trial counsel should have presented, but did not, a mitigation defense of organic brain damage. Alleged support for this theory came from expert witnesses who asserted this defense may have been available at trial if counsel had administered further tests to Glenn or done additional investigation about his background. Judge Siler, in dissent, stated:

> Certainly, in hindsight, one can find experts and

> other witnesses who might have helped Glenn. Whether they could have helped him any better than the ones that were available is pure speculation.
>
> * * *
>
> It does not appear to me that there were any material factors that were not introduced, except through experts who had been found after the trial who would have testified favorably for the defense.

(A18, A22). On February 26, 1996, the court denied the State's Petition for Rehearing and Rehearing En Banc. (A142).[2]

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[2] Under Ohio law Glenn cannot be resentenced to death at a new mitigation hearing. *State v. Penix*, 32 Ohio St.3d 369, 513 N.E.2d 744 (1987).

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONFIRM THAT THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 APPLIES TO PENDING CASES.

A. THE AMENDMENTS TO 28 U.S.C. §2254 APPLY TO THE INSTANT CASE.

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996, S. 735, was signed into law by President Clinton. Among other things, the Act amended 28 U.S.C. §2254, increasing the amount of deference that federal courts must give to state court rulings on matters of federal law in reviewing habeas petitions. Because this case was pending when the Act became effective and because the Act makes procedural and not substantive changes to existing law, this habeas petition should be assessed under the new standards set forth in the Act.

"Even absent specific legislative authorization," this Court has held that "application of new statutes passed after the events in suit is unquestionably proper in many situations." *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483, 1501 (1994). In *Landgraf*, the Court distinguished between retroactive application of statutes that affect substantive rights and those that merely affect procedural or jurisdictional rights. *Id.* at 1501-1505. The former category of statutes, *Landgraf* held, may not be applied to pending cases absent express statutory authorization; but the latter category of statutes does apply to pending cases even when there is congressional silence on the

point. *Id.* at 1502 & 1502 n.28.

The Act's amendments to section 2254 plainly do not impair substantive rights -- be they the right not to be exposed to increased liability for past conduct or the right not to have a new duty imposed that did not exist when the criminal act was committed. *See id.* at 1501-1505. Far from affecting the appropriate standards for assessing Glenn's past conduct, the amendments merely make procedural changes in the way ineffective assistance and other federal claims are handled in post-conviction habeas cases reviewing state court convictions. Nothing in the Act remotely affects Glenn's pre-existing duties not to commit murder or the standards for assessing guilt on such a charge. The amendments simply alter the way federal courts review state convictions in habeas cases. Indeed, in at least one prior instance, this Court has applied new legislation in assessing a habeas petition. *See Ex Parte McCardle*, 74 U.S. 506 (1868) (Congress repealed the Court's authority to entertain certain habeas cases and the Court applied the new law in dismissing a pending habeas petition).

In short, application of *Landgraf* makes clear that the Act does -- and should -- apply to Glenn's habeas petition. While the amendments to 28 U.S.C. §2254 are silent on whether they apply retroactively, the instant case was pending when the Act became effective. And, because the amendments affect procedural (not substantive) rights, they should be applied to all pending cases -- including this one.

B. THE AMENDMENTS TO 28 U.S.C. §2254 ALTER THE APPROPRIATE STANDARD OF REVIEW FOR THIS CASE.

In applying the ineffectiveness-of-counsel test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), the state

courts all concluded that Glenn had failed to establish prejudice in his sentencing from any alleged ineffective assistance by his trial counsel. On federal habeas, the district court reached the same conclusion.

In disagreeing with each of these conclusions, the Sixth Circuit applied a *de novo* standard of review:

> Like the state court of appeals the federal district court rested its disposition of the ineffective assistance question solely on the "prejudice" branch of the *Strickland* inquiry ***. We must review the entire question *de novo*, *see Strickland*, 466 U.S. at 698, and *Smith v. Livesay*, 970 F.2d 1575, 1579 (6th Cir. 1992) . . . .

(A5).

The amendments to 28 U.S.C. §2254 alter this standard of review. In particular, they require federal courts to give increased deference to state court rulings on questions of federal law and mixed questions of federal law and fact. Subsection (d) of Section 2254 now reads as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Properly recognizing the competency of state courts to apply clearly established decisions of this Court, the amendments establish that federal courts cannot upset state court rulings unless they are "unreasonable."

The presumption of correctness created by the amendments to 28 U.S.C. §2254 cannot be overcome in this instance. The state court of common pleas held a full hearing on postconviction review concerning Glenn's ineffective-assistance claim, and its written decision (A187-A188) was affirmed by the state court of appeals in its initial decision (A154, A155-A158, A178-A185) and upon rehearing (A144, A148). At each stage, the Ohio courts reasonably applied the *Strickland* standard. Under these circumstances, the decisions of the state courts should be respected by federal courts confronted with section 2254 habeas petitions. Because they were not, the decision below should be reversed.

C. CERTIORARI SHOULD BE GRANTED, TO RESOLVE TWO ISSUES OF NATIONAL IMPORTANCE -- THE APPLICABILITY OF THE AMENDMENTS TO 28 USC §2254 TO PENDING CASES AND ALTERATION OF THE *STRICKLAND* STANDARD IN LIGHT OF SUCH AMENDMENTS.

This case offers a vehicle to address two issues of national importance arising from the amendments to 28 USC §2254. First, the case raises the question whether the new amendments apply to hundreds (if not thousands) of habeas

petitions pending when the 1996 Act became effective. Second, the case implicates the proper application of the amendments to *Strickland* claims, a question raised in virtually everyone of these pending habeas petitions, and one that past being precedent surely will be raised in most future petitions.

II.

IN THE ALTERNATIVE, CERTIORARI SHOULD BE GRANTED TO ESTABLISH THAT THE *STRICKLAND* SUBSTANTIAL PREJUDICE PRONG IS NOT VIOLATED BY CLAIMS THAT EVIDENCE OF ALLEGED BRAIN DAMAGE IS MORE MITIGATING THAN EVIDENCE OF SERIOUS RETARDATION.

A. THE DECISION OF THE COURT BELOW THREATENS THE DEATH PENALTY MITIGATION PROCESS.

After fourteen years of litigation, after thorough review by the state courts and the federal district court, the Sixth Circuit determined that Mr. Glenn did not receive effective assistance of counsel during the mitigation phase of his sentencing proceeding. Distilled to its essence, the appellate court held that Glenn was substantially prejudiced by his trial counsel because they introduced psychiatric evidence to the effect that he was mentally retarded but did not introduce evidence adduced by later psychiatrists that Glenn *might have* suffered brain damage. Conspicuously missing from the court's opinion is any explanation "how the evidence of brain damage," in the words of dissenting Judge Siler, "is more mitigating that the fact that Glenn was retarded." (A20-21). No such line can be drawn. Nor should such manipulable distinctions be permitted to go unchecked.

During the mitigation phase of Glenn's sentencing hearing, Ohio law required the jury to weigh several mitigating factors. It had to weigh against the aggravating circumstances of the crime "the history, character and background of the offender," O.R.C. §2929.04(B), and determine whether "because of a mental disease or defect" the offender "lacked substantial capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law," O.R.C. §2929.04(B)(3), as well as consider "any other factors that are relevant to the issue of whether the offender should be put to death," O.R.C. §2929.04 (B)(7). (A6).

During this proceeding, Glenn's trial counsel sought and obtained the appointment of medical experts. Two doctors were appointed at state expense. The trial court appointed Dr. Ramani, a psychiatrist, and Dr. Siddall, a psychologist, to evaluate Glenn's mental capacity on behalf of the court. Dr. Siddall concluded that "the offense was not the product of psychosis, mental retardation, organic brain disease, other mental illness, lack of education, unusual emotional pressure, or inadequate coping skills on the part of Mr. Glenn." (A13). Dr. Ramani agreed that Glenn was "somewhat retarded." (A13 n.4). But he concluded that his retardation "doesn't appear to be severe enough to impair his judgment or his capacity." (A13 n.4).

After direct appeals were concluded, Mr. Glenn presented the testimony of new experts during his state post-conviction hearings. Dr. Tanley testified that Glenn had brain damage and speculated, but did not opine, that it might have resulted from a surgical operation performed on Glenn's mother under general anesthesia early in her pregnancy. (A10). Dr. Tanley and other newly hired experts then testified that it was "extremely unlikely" that Glenn was

capable of developing the plan to release his brother from custody, thus bolstering the contention that his brother was the mastermind of the escape plan. (A10). Based principally on this testimony, the Sixth Circuit majority (though no other state or federal courts) found prejudice in the mitigation process.

The majority made three speculative assumptions about the impact of this testimony on the prejudice prong of *Strickland*, not one of which supports the result it reached. First, the court appeared to assume that Drs. Siddall and Ramani would have testified differently if the information provided by Dr. Tanley and the other new experts had been available to them. No evidence supports this conclusion, however, except the suggestions of Glenn's own experts.

Second, the court speculated that, had the mitigation experts testified differently or had defense counsel obtained Dr. Tanley, the result would have been different. But, as the district court noted, there was substantial evidence to the contrary:

> In this case the crime was not spontaneous. It was not the result of a sudden unexpected confrontation. Rather, it was the product of a well thought out plan to bring about the successful escape of his brother from the custody of the sheriff.
>
> * * *
>
> In sum, the court concludes that if the petitioner's trial counsel had produced the additional evidence as presented during the post conviction evidentiary hearing there is not a reasonable probability that a different sentence

> recommendation would have been forthcoming from the jury.

(A102-A103).

Third, the court assumed that there was a meaningful distinction for prejudice purposes between psychiatric testimony that was introduced and psychiatric testimony that could have been introduced. The difference between the two, however, was far from clear. Two key pieces of evidence on this point were admitted: (1) Glenn was mentally retarded at the time of the murder; and (2) Glenn had a low IQ of 73-75 during the criminal prosecutions and appeals. What was not admitted, and allegedly should have been, was the following: (1) Some of Glenn's grade school IQ tests revealed scores in the 60's and one test at age 13 revealed an IQ of 56; (2) evidence of organic brain damage; and (3) evidence that brain damage "might well have" resulted from a surgical procedure given to Glenn's mother during her pregnancy.

The key point from the Sixth Circuit's perspective was the difference between being mentally retarded and having organic brain damage. But no medical (or other) evidence indicates that this is a tenable or even meaningful distinction in the context of a mitigation hearing for premeditated murder. The distinction then should not be used to sustain the reversal of an otherwise-proper capital sentence.

B. OTHER CIRCUIT COURTS HAVE REFUSED TO PERMIT CAPITAL DEFENDANTS TO HAVE TWO BITES AT THE MITIGATION APPLE.

As an initial matter, the decisions relied on by the

Sixth Circuit do not support this result.[3] Nor do decisions by other courts. On the contrary, they have been careful to prevent after-the-fact second guessing of mitigation hearings based on new psychiatric evidence.

Doyle v. Dugger, 922 F.2d 646 (11th Cir.), *cert denied*, *Doyle v. State*, 502 U.S. 926 (1991), like this case, involved a capital habeas petitioner who argued that his counsel's mitigation performance was ineffective because he "did not focus on *** [his] extreme emotional disturbance and substantial impairment of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." *Id.* at 651-652. But the Eleventh Circuit properly found that evidence as to the petitioner's mental and emotional problems had been presented on mitigation. The court also found that "the testimony of another mental health expert," presented during the state collateral relief hearing, would not suffice to overturn the sentence, *id.* at 652 n.4, because trial counsel had "adduced testimony before the sentencing jury that communicated to

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[3] The cited cases all related to the performance prong of *Strickland*. *See, e.g.*, *Stephens v. Kemp*, 846 F.2d 642 (11th Cir.), *cert denied*, 488 U.S. 872 (1988) (criticizing counsel for only putting on testimony about the defendant's mental condition through the defendant's own mother; *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir.), *cert denied*, 504 U.S. 943 (1992) (criticizing defense counsel for presenting no mitigating evidence at all during the penalty phase of the trial); *Loyd v. Whitley*, 977 F.2d 149 (5th Cir.), *cert denied*, 508 U.S. 911 (1993) (finding that defense counsel were not generally competent to handle a death case, that they had knowledge of defendant's mental problem yet did not investigate further the appointment of an independent psychiatric expert (which state law provided for), and that they misunderstood the difference between the McNaughten test for sanity and the Louisiana statutory mitigating circumstances of mental disease or defect).

the jury substantially the same evidence that collateral counsel asserts should have been adduced." *Id.* at 652.

Other cases are to the same effect. *See, e.g., Clisby v. Jones*, 960 F.2d 925, 930 n.8 (11th Cir. 1992); *Silagy v. Peters*, 905 F.2d 986, 1013 (7th Cir. 1990), *cert. denied*, 498 U.S. 1110 (1991) ("we would be reluctant to open up this type of *Ake* claim to a battle of the experts in a "competence" review. Every aspect of a criminal case which involves the testimony of experts could conceivably be subject to such a review -- a never ending process. *** The ultimate result would be a never-ending battle of psychiatrists appointed as experts for the sole purpose of discrediting a prior psychiatrist's diagnosis."); *Harris v. Vasquez*, 913 F.2d 606, 620 n.14 (1990) ("Harris cannot now obtain a 'second bite at the apple' because he believes a new group of psychiatrists would offer a different defense than the psychiatrists originally chosen by Ryan, or that because the defense of remorse did not work with the jury the first time, a battle of experts might work at another trial.").

No empirical evidence is needed to establish that the post-trial litigation strategy, thus far successfully employed by Glenn, is ripe for use in other pending and future cases. This Court should grant certiorari to give guidance to the lower courts about when later-presented psychiatric evidence can establish "prejudice" under the *Strickland* test. At a minimum, capital defendants should be required to show not just a new diagnosis, but should be forced to demonstrate that substantial prejudice flowed from the introduction of one form of mitigating psychiatric evidence over another. Here, the Sixth Circuit mistakenly focused on the evidence that was not introduced while failing fully to consider the impact of evidence that was introduced. At best, there was a marginal difference between the two; at worst, they were virtually one and the same.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari, or in the alternative grant certiorari and remand the case for reconsideration in light of the recent amendments to 28 U.S.C. §2254.

Respectfully submitted,

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